



## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

[Docket No. PTO-C-2023-0009]

#### Study of the Patent Pro Bono Programs; Notice of Public Listening Sessions and Request for Comments

**AGENCY:** United States Patent and Trademark Office, U.S. Department of Commerce.

**ACTION:** Notice of public listening sessions; request for comments.

**SUMMARY:** The United States Patent and Trademark Office (USPTO) seeks public comments on areas related to the study of the patent pro bono programs identified in the Unleashing American Innovators Act of 2022. This study builds upon the work the USPTO has conducted for over a decade and has scaled during the Biden Administration, to bring more people in America into the innovation ecosystem to create more jobs, foster economic prosperity, and solve world problems. The USPTO is announcing two public listening sessions on June 5 and 7, 2023, titled “Inventor Listening Session for Patent Pro Bono Programs” and “Patent Practitioner Listening Session for Patent Pro Bono Program,” respectively, to provide further opportunity for the public to provide input on these subject areas.

**DATES:** *Public Listening Sessions:* The public listening session for inventors, entrepreneurs, and small businesses will be held on June 5, 2023 from 5:30 p.m. to 8:30 p.m. ET. The public listening session for legal professionals will be held on June 7, 2023 from 1 p.m. to 4 p.m. ET. The listening sessions will be available for in-person or virtual attendance. Advance registration is required. Persons seeking to attend either session must register by June 2, 2023. Registration information for the June 5, 2023 inventor listening session is available at: <https://www.uspto.gov/about-us/events/inventor-listening-session-patent-pro-bono-programs>. Registration for the June 7, 2023 patent practitioner listening session is available at: <https://www.uspto.gov/about-us/events/patent->

practitioner-listening-session-patent-pro-bono-programs. Seating is limited for in-person attendance.

*Written comments:* Written comments will be accepted until [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** *Public Listening Sessions:* The public listening sessions will take place in person in the Global Intellectual Property Academy Conference Center Venice Room at the USPTO, 600 Dulany Street, Alexandria, VA 22314. The sessions will also be available via webinar for those wishing to attend remotely. Webinar access information will be provided in advance to those who register for virtual attendance.

*Request for Comments:* For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). To submit comments via the portal, enter docket number PTO-C-2023-0009 on the homepage and click “search.” The site will provide a search results page listing all documents associated with this docket. Find a reference to this request for comments and click on the “Comment” icon, complete the required fields, and enter or attach your comments.

Attachments to electronic comments will be accepted in ADOBE® portable document format (PDF) or MICROSOFT WORD® format. Since comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions regarding how to submit comments by mail or by hand delivery.

**FOR FURTHER INFORMATION CONTACT:** Will Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline, at 571-272-4097.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On December 29, 2022, President Biden signed the Consolidated Appropriations Act, Pub. L. 117-328. The Act provided appropriations to federal agencies and established or modified various programs. It included the Unleashing American Innovators Act of 2022 (UAIA or the Act) which, among other things, required that the Director of the USPTO complete a study of the patent pro bono programs, i.e., programs established pursuant to section 32 of the Leahy-Smith America Invents Act.<sup>1</sup> The objective of the study is to assess whether: the programs sufficiently serve participants, the programs are sufficiently funded, participation requirements deter participation among inventors, inventors are aware of the program, any factors may deter attorney participation, and the program should include non-attorney advocates. The report may address any other issue that the Director of the USPTO deems appropriate in assessing these programs.

According to the USPTO Chief Economist's report titled "Intellectual Property and the U.S. Economy: Third Edition," the average weekly earnings in 2019 for those employed in industries that intensively use intellectual property (IP) (e.g., utility patents, design patents, trademarks, and copyrights) are 60% higher than the average weekly earnings for workers in other industries. See <https://www.uspto.gov/ip-policy/economic-research/intellectual-property-and-us-economy>. Workers in IP-intensive industries make \$1,517 per week on average, compared to \$947 for those in non-IP-intensive industries. IP-intensive industries also offer better benefits, including retirement plans, health

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<sup>1</sup> See Pub. L. No. 112-29, 125 Stat 284 (2011).

insurance, and more full-time (as opposed to part-time) employment opportunities, which means greater job stability. In 2019, IP-intensive industries accounted for \$7.8 trillion—or 41% —of total U.S. gross domestic product (GDP).

Our IP-intensive industries directly employ 47.2 million Americans, and indirectly, they employ another 15.5 million. They account for 44% of all the jobs in the United States. In 2019, MIT’s Sloan School of Management observed from a sample that firms with patent and trademark protection were 278 times more likely to experience financial growth than firms that did not. *See* Christian Catalini et al., *Passive Versus Active Growth, Evidence from Founder Choices and Venture Capital Investment* (2019).

At the USPTO, we are guided by the vision that expanding participation of under-represented groups to achieve equitable representation in patenting can substantially grow our economy, adding an estimated \$1 trillion to GDP.<sup>2</sup> It is not just about GDP, but more jobs and an increased standard of living for all.

Increased participation in our patent system is essential for job creation, economic prosperity, and for solving world problems. Preparing a patent application and conducting proceedings before the USPTO to obtain a patent require significant knowledge of patent laws, regulations, and USPTO procedures. As a result, most inventors hire registered patent attorneys or agents to assist them. Under-resourced inventors may not be able to afford such representation. To help address this issue, Congress directed the USPTO to support a nationwide network of independently operated pro bono programs, collectively referred to as the Patent Pro Bono Program. The Patent Pro Bono Program helps under-resourced inventors obtain free legal help to prepare, file,

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<sup>2</sup> *See* [https://www.brookings.edu/wp-content/uploads/2020/08/Cook\\_PP\\_LO\\_8.13.pdf](https://www.brookings.edu/wp-content/uploads/2020/08/Cook_PP_LO_8.13.pdf).

and prosecute patent applications and is available nationwide via 21 regional independent not-for-profit programs, many of which serve multiple states.

When the USPTO meets people where they are with pro bono legal counsel, we see vast improvements in representation. Under the Biden Administration, the USPTO has worked with the 21 regional independent not-for-profit programs and the Pro Bono Advisory Council to expand the USPTO's support for the Patent Pro Bono Program and to expand the program's offerings. Although women make up about 13% of U.S. inventors, our data for participation in 2022 shows that 43% of those who participate in our Patent Pro Bono Program and chose to identify their gender, identify as women. 35% identify as African American or Black, 5.7% identify as Asian American or Native Pacific Islander and 1.5% identify as Native American. Nearly 14% of those who chose to identify their ethnicity, identified as Hispanic American. Approximately 8% of patent pro bono participants identified as veterans.

The USPTO encourages and supports pro bono offerings for patent prosecution through the USPTO Law School Clinic Certification Program (LSCCP). During the Biden Administration, participation in the LSCCP reached an all-time high and now includes 62 law schools across the U.S. that provide pro bono patent and/or trademark legal services to qualified under-resourced inventors, entrepreneurs, and small businesses. *See* <https://www.uspto.gov/learning-and-resources/ip-policy/public-information-about-practitioners/law-school-clinic-1?MURL=lawschoolclinic>.

The USPTO offers a Patent Trial and Appeal Board (PTAB) Pro Bono Program. The PTAB Pro Bono Program helps under-resourced inventors obtain free legal assistance to prepare and file appeals before the PTAB and similarly is available nationwide. The PTAB Bar Association operates as a clearinghouse for the PTAB Pro Bono Program. The

USPTO and PTAB Bar Association have plans to extend the PTAB Pro Bono Program to include AIA appeals in 2023.

The USPTO currently collects data from participating law school clinics on a semi-annual basis. *See* 37 CFR 11.17(b). Therefore, the scope of this Request for Comment focuses exclusively on the Patent Pro Bono Program and the PTAB Pro Bono Program and will complement the existing data collection for the LSCCP.

## **II. Program Participation Requirements**

For the Patent Pro Bono Program, the regional pro bono programs match volunteer patent attorneys and agents with financially under-resourced inventors and small businesses for the purpose of securing patent protection. Each regional program sets different requirements for participation. The participation requirements address income level, knowledge of the U.S. patent system, and that the inventor possess an invention. Most regional programs require that an applicant's gross household income be less than three times the federal poverty level guidelines. Applicants should demonstrate knowledge of the patent system through filing of a provisional patent application or completing a training course. The applicant must be able to describe the features of the invention and how it works. For a list of the participation requirements for the Patent Pro Bono Program, see [www.uspto.gov/patentprobono](http://www.uspto.gov/patentprobono).

The PTAB Pro Bono Program operates through a national clearinghouse, administered by the PTAB Bar Association, which matches volunteer patent attorneys and agents with financially under-resourced inventors for the purpose of preparing appeals. Participation requires an applicant to have a gross household income less than three times the federal poverty level guidelines, knowledge of the appeal process through completion of two training videos, and a distinct issue for appeal. The national clearinghouse sets a one-

month timing requirement for applicants to apply to the program to ensure enough time to file the appeal and to avoid USPTO extension of time fees. For a list of the participation requirements for the PTAB Pro Bono Program, see [www.uspto.gov/ptabprobono](http://www.uspto.gov/ptabprobono).

### **III. Purpose and Scope of the Listening Sessions and Request for Comments**

Following the congressional mandate set forth in the UAIA, the USPTO is currently performing a study to assess the functioning of the Patent Pro Bono Program. The agency desires feedback from stakeholders so that it may, as appropriate, evaluate the programs and make recommendations to Congress regarding possible administrative and legislative action. We are seeking feedback from a broad group of stakeholders, including, but not limited to, inventors, small businesses, entrepreneurs, patent attorneys, patent agents, law firms, non-profit organizations, academic institutions, public interest groups, and the general public.

The USPTO is holding two listening sessions on June 5 and 7, 2023, and requesting public comments on several questions posed in this section. The USPTO will use a portion of the listening sessions to provide an overview of the programs. An agenda will be available a month before each listening session on the USPTO website. The agenda for the inventor listening session is available at: <https://www.uspto.gov/about-us/events/inventor-listening-session-patent-pro-bono-programs>. The agenda for the patent practitioner listening session is available at: <https://www.uspto.gov/about-us/events/patent-practitioner-listening-session-patent-pro-bono-programs>. Both web addresses are the same addresses for registration.

The USPTO poses the following questions for public comment. These questions are not meant to be exhaustive. We encourage interested stakeholders to address these and/or other related issues and to submit research and data that inform their comments on these

topics. Commenters are welcome to respond to any of the questions and are encouraged to indicate which questions their comments address. Reference to the “patent pro bono programs” in these questions covers the 21 regional programs participating in the Patent Pro Bono Program. Commenters may also provide general feedback regarding the PTAB Pro Bono Program for the same questions set forth below. Commenters providing feedback regarding the PTAB Pro Bono Program should specify that their response pertains to the PTAB Pro Bono Program.

1. What is your experience with the patent pro bono programs, *e.g.*, as an administrator, volunteer attorney, participant, or other status?
2. Are the patent pro bono programs sufficiently serving existing participants?
3. If the patent pro bono programs are not sufficiently serving existing participants, what barriers currently exist that prevent the programs from sufficiently serving these participants? What opportunities exist for the patent pro bono programs to better serve these participants?
4. Are there additional services that existing participants would like to see the patent pro bono programs provide?
5. Are the patent pro bono programs sufficiently serving prospective participants?
6. If the patent pro bono programs are not sufficient to serve prospective participants, what barriers may exist that prevent the programs from sufficiently serving these participants? What opportunities exist for the patent pro bono programs to better serve these participants?



7. Are the patent pro bono programs sufficiently funded to serve prospective and existing participants? If not, how much additional funding would be appropriate to serve prospective and existing participants and how would that funding be utilized?
8. Are any of the current participation requirements for the patent pro bono programs a deterrent for prospective participants? How can or should the participation requirements be changed to better serve these participants?
9. Are prospective participants aware of the patent pro bono programs? What more can be done to improve awareness of the pro bono programs for these participants?
10. Would the removal of any of the current participation requirements for the patent pro bono programs be a deterrent for attorneys or agents to volunteer to participate in the programs?
11. Are there any participation requirements that attorneys would like to see changed or added to facilitate their representation of participants?
12. What factors deter attorneys from volunteering to participate in patent pro bono programs?
13. What barriers exist to greater participation of attorneys in the patent pro bono programs?
14. What factors encourage attorneys to volunteer to participate in patent pro bono programs?
15. What services, beyond patent application drafting and prosecution, do pro bono program attorneys provide to patent pro bono program participants?

16. Would the patent pro bono programs be improved by expanding them to include non-attorneys, including patent agents and patent paralegals?
17. Have the patent pro bono programs made existing and prospective participants more informed about the U.S. patent system, and if so, how?
18. One of the goals of the program is to provide support to innovators, particularly underrepresented innovators. For patent pro bono program administrators, what are some of the effective steps or best practices that have enabled you to reach populations previously underserved by the patent system?
19. For patent pro bono program administrators, what steps do you recommend that the USPTO take to dramatically increase patent pro bono representation within your region?

**Katherine K. Vidal,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

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